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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1967

No. 717

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-styled cause on April 4, 1967.

Petition for a Writ of Certiorari to the District Court of Appeal, Third District, was timely sought in the Supreme Court of Florida, which by its order of July 13,

1967, dismissed the cause for lack of jurisdiction. The jurisdictional ground relied upon in the Petition for Writ of Certiorari was conflict of decision between the instant decision and a prior decision of the Florida Supreme Court: City of Miami v. Kayfetz, 92 So.2d 798, (Fla. 1957) pursuant to Florida Appellate Rule 4.5c (6) and Article V, Section 4, of the Florida Constitution.

The record in the District Court of Appeal, Third District, is no longer available from that Court, it having been sent back to the lower court. Since the record in the Supreme Court of Florida contained the essential items (all of which were part of the record before the District Court of Appeal of Florida, Third District), a certified copy of the record in the Supreme Court of Florida has been provided.

CITATION TO OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, was reported in 197 So.2d 50. (Appendix A.) The opinion of the Supreme Court of Florida is reported in ____So.2d____. (Appendix B.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3) in that a right is claimed under the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

Is a city ordinance which prohibits a liquor licensee

from knowingly employing a homosexual person, or from knowingly selling to, serving or allowing a homosexual person to consume alcoholic beverages, or to allow two or more homosexual persons to congregate or remain in his place of business, violative of the rights of the petitioner, an admitted homosexual, to freedom of association, due process and equal protection of the laws, under the First and Fourteenth Amendments to the United States Constitution, respectively?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States and Florida Constitutions and relevant Statutes are set forth in Appendix C as follows:

Florida Statutes 800.01 and 800.02
Article V, Section 4, Florida Constitution
28 USC Sec. 1257 (3)
United States Constitution, Amendment I
United States Constitution, Amendment XIV, Sec. 1
Section 4-13, City Code of Miami

STATEMENT OF THE CASE

The Petitioner filed a petition for declaratory decree and injunction in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The petition, with permission of the Circuit Court, was amended to add as party defendant the State Attorney for the said judicial circuit in addition to the already named City of Miami. The relief sought by Petitioner, who alleged in

his petition that he is a homosexual person (R-1-Amended Petition), was a declaratory decree as to the validity and constitutionality of a City of Miami ordinance (R-3-Amended Petition and Appendix C), Section 4-13 of the City Code, and for an injunction prohibiting the City and the State Attorney from enforcing and imposing the provisions of said Section against the Petitioner. The said ordinance makes it a crime for the owner of an establishment serving intoxicating liquor to employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to allow two or more homosexuals to congregate or remain in his place of business.

The Petition alleged that the Petitioner is a homosexual person and that the ordinance is "arbitrary as to those persons against whom it is to be applied, it does not give any valid definition of those against whom it is to be applied, it is in violation of the First Amendment to the Constitution of the United States in that it violates the rights of assembly" and the petition further alleged violation of the Fourteenth Amendment by denying Petitioner and others similarly situated the right to due process and equal protection of the laws. The Petitioner also alleged that by virtue of the said ordinance he is wrongfully and unlawfully barred from enjoying the rights and privileges guaranteed him as a citizen of the United States of America.

After the respondents answered and on motion of the respondents for summary final decree, the Circuit Judge entered a final decree declaring the ordinance to be constitutional and denying the Petition for an injunction. Appeal was prosecuted to the District Court of Ap-

peal of Florida, Third District, which affirmed the decree (Appendix A). Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Third District, was timely filed in the Florida Supreme Court, pursuant to Article V, Section 4 of the Florida Constitution. Said Petition was dismissed for lack of jurisdiction. (Appendix B.)

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The instant case raises important questions of First Amendment right to assembly and Fourteenth Amendment due process and equal protection of the laws, with reference to homosexual persons. The decision of the District Court of Appeal of Florida, Third District, is predicated upon two Florida Statutes, Sections 800.01 and 800.02, (Appendix C), making certain conduct a crime: the first-mentioned prohibiting the crime against nature and the second-mentioned prohibiting unnatural and lascivious acts. Because specific acts are made criminal in the State of Florida, reasons the Court, the State, by virtue of its police power, may inhibit the gathering of homosexuals where liquor is sold and prohibit the sale or service to them for on-premises consumption because the criminal acts, prohibited by Florida Statutes, Sec. 800.01 and 800.02, when practiced, are of a homosexual nature. In effect, what the State is doing is penalizing a status or condition when no criminal act is being committed. In **Robinson v. California,** 370 U.S. 660, 82 S.Ct. 1417 (1962), the concurring opinion of Mr. Justice Harlan pointed out that drug addiction is nothing more than a compelling propensity to use narcotics, but that this mere

desire to use narcotics (and thereby to commit a criminal act by the use) could not be the subject for criminal punishment. Distinction was made between a status or condition as opposed to the actual use of narcotics. Similarly, homosexuality is a status or condition; it is two forms of sexual conduct, of a homosexual nature, which are prohibited by Florida Statutes 800.01 and 800.02. The status of homosexuality is not made criminal by any statute of the State of Florida, nor could the state enact such statute. **Robinson v. California, supra.** Yet the status is penalized by the subject ordinance in that persons of this status, who are not committing any criminal acts, and which status is not criminal, are prohibited from exercising rights and privileges enjoyed by other persons.

The status of homosexuality has been recognized as inadequate to sustain an allegation of immoral conduct brought by the United States Civil Service Commission, which disqualified a homosexual applicant for public employment. The disqualification on the ground of the applicant's homosexuality, without more, was held invalid. **Scott v. Macy,** 349 F.2d 182 (D.C. Cir. 1965). Entitled to public employment by the United States Government, a homosexual, nevertheless, is prohibited, by virtue of his status, from entering a lounge in Miami, alone or with a fellow employee after work, and buying a drink.

That the term "homosexual" has no clearly defined meaning is recognized in **Scott v. Macy, supra,** which recognizes the view that the term may be applied to activities, *attitudes,* feelings, *thoughts,* or repression of any of these. By disallowing a homosexual to drink or be served an alcoholic beverage in a licensed lounge or bar, the State

is circumscribing or denying his liberty without due process of law and is denying to him rights enjoyed by others, resulting in a denial of equal protection of the laws.

The test set forth by this Court in determining whether a State has denied its citizens equal protection is predicated on the rational basis on which the State bases its action. **Jacobsen v. Massachusetts,** 197 U.S. 11. If there has been an arbitrary or irrational classification by the State, such action has been held to be violative of the equal protection clause of the Fourteenth Amendment. **Skinner v. Oklahoma,** 316 U.S. 535 (1942). That homosexuals have risen high in public service — both in Congress and in the Executive branch and have served with distinction—is recognized in Mr. Justice Douglas' dissent, joined in by Mr. Justice Fortas, in **Boutilier v. Immigration and Naturalization Service,** ____U.S.____, 18 L.Ed.2d 661 (1967). Judge Moore's dissent in **Boutilier v. Immigration and Naturalization Service,** 363 F.2d 488 (2nd Cir. 1966), cites as homosexuals some great contributors to western culture, namely Sappho, Leonardo da Vinci, Michelangelo, André Gide, and perhaps even Shakespeare. In light of these pronouncements, it is difficult to eke out a rational basis for the classification created by the State (through its delegee, the City of Miami) in the subject ordinance. Furthermore, it has been held that the liquor business is like any other business in that the State is limited in its regulation of it by due process and equal protection requirements. **Hornsby v. Allen,** 330 F.2d 55 (5th Cir. 1964).

The problem of homosexuality is not an isolated one and because many people are affected, it is a valid sub-

ject for judicial inquiry by this Court. It has been recognized (in the dissent of Mr. Justice Douglas, joined in by Mr. Justice Fortas, to **Boutilier v. Immigration and Naturalization Service, supra,** citing Kinsey, **Sexual Behavior in the Human Male**) that homosexual activity in the human male is much more frequent than is ordinarily realized and that in the age group of single males between 36 and 40 the incidence of homosexual experience is 38.7% (thirty-eight and seven-tenths per cent).

In **Vallerga v. Dept. of Alcoholic Beverage Control,** 1 Cal. Rptr. 494, 347 P.2d 909 (Cal. 1960), a statute provided that a basis for liquor license suspension or revocation is the use of the premises as a resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers or sexual perverts. It was held that the allegation and admission that the premises were established as a resort for lesbians and homosexuals was not sufficient to justify revocation or suspension upon mere proof of resorting to or patronage of licensed premises without proof of illegal, immoral or indecent action on such premises. In **Stoumen v. Reilly,** 37 Cal. 2d 713, 234 P.2d 969 (1951), where there was no evidence of misconduct by homosexuals meeting in and patronizing the licensee's premises, it was stated:

> "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts."

As to the right of assembly or association, it has been held that the Fourteenth Amendment to the United

States Constitution makes the First Amendment applicable to the States. **Murdock v. Pennsylvania,** 319 U.S. 105, 63 S.Ct. 830 (1943). As demonstrated hereinabove, no rational basis for the classification can be found; therefore, the right to assemble should not be infringed and should be guaranteed to Petitioner. No matter how unpopular the views of the minority group assembling, the right to associate is guaranteed under the First Amendment. The concurring opinion of Mr. Justice Black in **Gibson v. Florida Legislative Investigating Committee,** 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889 (1963), is illustrative of this principle. The fact that the subject ordinance penalizes the liquor licensee and not the homosexual does not redeem it, for what a state may not do directly, it may not accomplish indirectly. As long as Petitioner does not indulge in conduct violative of the laws of Florida, he has a constitutional right to enter a bar and associate with whom he pleases whether his associates be heterosexual, homosexual or asexual. Homosexuality, in and of itself, is not a crime, while the practice of homosexual acts is a crime. Petitioner, so long as he does not practice such acts or persuade others to do so, commits no crime which prohibits him from contact with other persons, whether they be homosexual or heterosexual.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALFRED I. HOPKINS

JUDITH A. BRECHNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District, was served this _____ day of October, 1967, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to RICHARD E. GERSTEIN, State Attorney, Metropolitan Justice Building, Miami, Florida, and JACK RICE, Esq., City Attorney, City of Miami, 65 SW First Street, Miami, Florida.

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A. D. 1967

CASE NO. 66-551

RICHARD A. INMAN,

Appellant,

vs.

CITY OF MIAMI, a municipal corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit, In and for Dade County, Florida,

Appellees.

Opinion filed April 4, 1967.

An Appeal from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Maurice Rosen; Tobias Simon, for appellant.

Richard E. Gerstein, State Attorney; Jack R. Rice,

Jr., City Attorney and S. R. Sterbenz, Assistant City Attorney, for appellees.

Before PEARSON, CARROLL and BARKDULL, JJ.

PEARSON, Judge.

This appeal is from a final decree in a declaratory action. The trial court held an ordinance of the City of Miami constitutional as against the attacks of the appellant. Appellant's complaint alleged that he is a homosexual, and that by the ordinance he is denied the right to "visit and enjoy himself or with his friends who are similarly situated the public places of amusement within the City of Miami." The ordinance prohibits liquor licensees from knowingly employing a homosexual person, or knowingly sell to, serve, or allow a homosexual person to consume alcoholic beverages, or to knowingly allow two or more homosexual persons to congregate or remain in his place of business. Appellant did not attack a particular section or provision of the ordinance but confines himself to a prayer: ". . . that this court take jurisdiction of this matter and find section 4-13 of the Code of the City of Miami to be unconstitutional and that it issue its order enjoining the respondents from enforcing the provisions of said ordinance."

The final decree appealed holds that this section of the code of the City of Miami "has a rational relation to public health, morals, safety and general welfare." We agree.

It may be that the ordinance is inartfully drawn and that enforcement of one or more provisions may prove

difficult or even impossible. Nevertheless, the question here presented is whether it is void as a whole. When a court construes the validity of an ordinance, it must construe it to be legal if it is possible to do so. It must also strive to construe it as to give reasonable effect to its provisions. City of Miami v. Kayfetz, Fla.1957, 92 So.2d 798. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State v. City of Miami, 101 Fla. 585, 134 So. 541. (1931).

The business of the distribution of liquor is one which is particularly burdened with a public concern and which may be limited and regulated by the State as a privilege. It follows that the legislative authority may limit its distribution to conditions under which liquor will be distributed with the least possible harm to the public. City of Miami v. Kayfetz, Fla.1957, 92 So.2d 798; City of Miami v. Jiminez, Fla.App.1961, 130 So.2d 109. The object of the ordinance as a whole is to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal by the Legislature of the State of Florida. See Sections 800.01, 800.02 Fla.Stat.

It therefore follows that appellant's generalized attack upon the ordinance as a whole was properly denied.

The City by cross assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, because there was unrefuted evidence showing that appellant was not a homosexual at the time the pro-

ceeding was instituted. In view of our conclusion upon the appeal, it is unnecessary to consider the exercise of the trial court's discretion in this particular.

The decree is affirmed.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1967

THURSDAY, JULY 13, 1967

CASE NO. 36,433

DISTRICT COURT OF APPEAL,

THIRD DISTRICT

RICHARD A. INMAN,

Petitioner,

vs.

CITY OF MIAMI, ETC., ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy
TEST:
SID J. WHITE
Clerk Supreme Court.
CC: Hon. W. P. Carter
Hon. E. B. Leatherman
Hon. Judith A. Brechner
Messrs. Maurice Rosen and Tobias Simon
Hon. Jack R. Rice, Jr.; Attn. S. R. Sterbenz
Hon. Richard E. Gerstein

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida Statute, Section 800.01

Crime against nature; punishment. Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years.

Florida Statute, Section 800.02

Unnatural and lascivious act. Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.

Article V, Section 4, Florida Constitution

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may

issue writs of certiorari to commissions established by law.

28 USC 1257 (3)
State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or Commission held or authority exercised under, the United States.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV, Sec. 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4-13, City Code of Miami

It shall be unlawful for an owner, manager, operator or employee of a business licensed to sell intoxicating beverages to knowingly employ in such business a homosexual person, lesbian or pervert as the same are commonly accepted and understood. It shall likewise be unlawful for an owner, operator, manager or employee of a business licensed to sell intoxicating beverages to knowingly sell to, serve to or allow consumption of alcoholic beverages by a homosexual person, lesbian, or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business.